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Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 56

AMERICAN FEDERATION OF LABOR, JOHN FITZPATRICK, CHICAGO FEDERATION OF LABOR, ET AL.,

Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

BRIEF FOR PETITIONERS.

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Petitioners,

vs.

ROSS W. SWING, IRENE BOIVIN, NAN CHAPMAN, ET AL.,

Respondents.

BRIEF FOR PETITIONERS.

The Opinions Below.

Upon the temporary injunction herein involved, the opinion of the Illinois Appellate Court for the First District is reported in 298 Ill. App. 63, and the opinion of the Supreme Court of Illinois is reported in 372 Ill. 91. The opinion and dissent in the Supreme Court of Illinois are printed in full in the record. (R. 24-33.) The permanent injunction, which is the same as the temporary injunction, except for certain findings and for a broader statement as to applicability, was entered by the Illinois Appellate Court without opinion, (R. 36-39), and writ of error with respect thereto was dismissed by the Supreme Court of Illinois without opinion. (R. 45-47.)

Jurisdiction.

A federal constitutional issue as to freedom of speech and of assembly under the Fourteenth Amendment was presented to and adversely disposed of by the Supreme Court of Illinois in its opinion upon the temporary injunction. (R. 26.) In writ of error to the Supreme Court of Illinois upon the permanent injunction this federal issue was preserved. (R. 39.) Certiorari from this Court was originally sought to review the temporary injunction, on the grounds (1) that the highest state court had left nothing to the judicial discretion of the lower court (*Rio Grande Western Railway Co.* v. *Stringham,* 239 U. S. 44), and (2) that to deny certiorari with respect to the temporary injunction would leave the petitioners "powerless to avert the mischief of the order." (*Perlman* v. *United States,* 247 U. S. 7, recently discussed in *Cobbledick* v. *United States,* 309 U. S. 323.) Certiorari having been denied with respect to a review of the temporary injunction (1939 Term, No. 615), the issue with respect thereto is presented at the first opportunity open to petitioners (*Gant* v. *Oklahoma City,* 289 U. S. 98, 100), and all issues both as to the temporary and the permanent injunctions are properly before this Court.

Jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code.

Statement of the Case.

This case involves the validity of paragraphs (a), (b), (c) and (d) of injunctions the provisions of which are set forth at page 6 of this brief. The validity of such paragraphs is contested on the ground that they restrain freedom of speech and of assembly in violation of the Fourteenth Amendment to the Constitution of the United States. No issue was made in the Appellate or Supreme Courts of

Illinois or is now made as to the validity of the provisions of the injunctions so far as they enjoin acts of violence. This is made clear by the statement of the Supreme Court of Illinois that "it will not pick and choose" (R. 28), and by the statement in dissent that "this case does not involve the question of restraining violence." (R. 29.) Paragraphs (a), (b), (c) and (d) are identical in both the temporary and permanent injunctions, and their scope is affected by paragraph (h) which is also identical in the two injunctions.

A temporary injunction, in the terms set out on page 6 of this brief was granted by the Circuit Court of Cook County, Illinois, on July 17, 1937, upon the basis of complaint by Swing and his employees. (R. 13-14.) The complaint alleged an effort upon the part of the defendant unions and their members to unionize Swing's beauty parlor, whose employees were not members of the union; that violence had been used in picketing and solicitation; and that pickets carried signs that "This Beauty Shop is Unfair to Organized Labor"; and that such signs were false and malicious. (R. 1-13.)

Subsequent to the issuance of the temporary injunction, the defendants barbers and hairdressers unions filed sworn answers, on July 27, 1937, and August 26, 1937. (R. 16, 18.) The answer of defendant Hairdressers and Cosmetologists union denied acts of violence; alleged that the signs displayed by pickets were true and that there was never more than one picket in front of or in the vicinity of Swing's shop; alleged that more than ninety per cent of some 200 beauty shop operators employed in the area were members of the union; admitted that Swing's employees were not members of the union but alleged that they were threatened with discharge if they joined the union; and alleged a right to picket or unionize Swing's shop and to obtain for its employees wages and hours commensurate with that of other employees. (R. 18-23.)

Thereafter, on January 20, 1938, the Circuit Court of Cook County, Illinois, on motion of defendants to dissolve the injunction and dismiss the cause for want of equity on the face of the complaint, dissolved the injunction, struck the complaint for want of equity on its face, set a day for the assessing of damages, and gave plaintiffs leave to file an amended complaint. (R. 15.) Plaintiffs elected to stand on their complaint, and on February 15, 1938, the Circuit Court of Cook County struck the complaint for want of equity on its face, dismissed the cause, and assessed damages against the plaintiffs. (R. 15, 16.)

The effect of a motion to dismiss as an admission of facts well pleaded in the complaint is discussed at pages 27-29 of this brief. For the purposes of the motion such facts were admitted.

The plaintiffs appealed to the Appellate Court for the First District of Illinois. That Court on December 21, 1938, without remandment of the case, reversed, annulled and set aside the orders of the Circuit Court bearing date of January 20, and February 15, 1938, and taxed costs against appellees, who were defendants below. (R. 23-24.) The Appellate Court granted leave to appeal to the Supreme Court of Illinois by a certificate of importance. (R. 24.) The Supreme Court of Illinois entered judgment on June 19, 1939, affirming the judgment of the Appellate Court and taxing costs against appellants in that Court, who were the defendants in the trial court. (R. 33.) The Supreme Court of Illinois denied rehearing on October 13, 1939. (R. 34.)

The opinion of the Supreme Court of Illinois appears in 372 Ill. 91, and is set forth in full in the record, together with the dissent therein. (R. 24.) The opinion is primarily based on the view that allegations of violence were admitted by the motion to dismiss, and that all provisions of the temporary injunction must be treated as a whole.

The annulment of the orders of the trial court, which were based on the granting of a motion to dismiss, necessarily constituted a denial of that motion, and a final disposition of all admissions made thereby. Further judicial action was thereafter based upon the pleadings, and involved only such admissions as are made in the sworn answers of defendants who are petitioners here. (R. 16, 18.)

Upon remandment of the case by the Supreme Court of Illinois, a decree was entered by the Appellate Court of Illinois, First District, on February 16, 1940, making permanent the terms of the injunction originally issued by the trial court and applying such injunction not only to the unions and their members but "to all other persons, as agents, representatives, members, attorneys of the defendants and all persons acting in concert with said trade union defendants and individual defendants." The decree of the Appellate Court is set out in full in the record. (R. 36-39.)

Two provisions of the decree of the Appellate Court emphasize the issue here made by petitioners:

(1) Paragraph 3 of the decree specifically finds that the right to injunctive relief is based upon the absence of an employer-employee relationship between the parties.

(2) The injunction is expressly made applicable, not only to the defendants, but to "all persons acting in concert with said trade union defendants."

With respect to the paragraphs of the permanent injunction forbidding peaceful action which are here contested by petitioners, the finding by the Appellate Court that the right to injunctional relief arises out of the absence of an employer-employee relationship removes from the case all elements of force or of alleged untrue signs. And the dismissal of writ of error by the Supreme Court of Illinois constitutes an affirmance of the finding by the Appellate Court. This matter is further discussed at pages 24-27 of this brief.

A writ of error was sued out in the Supreme Court of Illinois to review the validity of the decree entered by the Appellate Court making permanent the terms of the injunction here involved. Defendants in error moved to dismiss the writ of error on the ground that all the rights of the parties had been finally settled on previous appeal, and that plaintiffs in error were not entitled to a further review. (R. 43-45.) This motion was granted by the Supreme Court of Illinois and writ of error dismissed on April 4, 1940. (R. 46-47.)

The acts enjoined by identical terms of the temporary and permanent injunctions are as follows:

(a) Picketing or maintaining any picket or pickets at or near the place of business of plaintiff (Swing) at 5558 West North Ave.

(b) Patrolling or congregating in front or in the vicinity of plaintiff's business, in furtherance of picketing;

(c) Exhibiting or causing to be exhibited any sign or placard or other matter in front of or in the vicinity of plaintiff's business, designating the plaintiff's business as being nonunion or unfair to organized labor, or as refusing to permit collective bargaining, or designed to induce or influence persons not to enter plaintiff's place of business;

(d) Soliciting, inducing, or influencing or attempting to induce or influence persons, employees or prospective employees of plaintiff not to enter his place of business or do business with him;

(e) Menacing, intimidating, threatening or harassing persons employed by or persons going to and from plaintiff's place of business; from calling plaintiff and members of plaintiff's family and plaintiff's employees vile names and shouting offensive epithets;

(f) Threatening, coercing, intimidating or assaulting the employees of the plaintiff or harassing the employees of the plaintiff, while on their way to and from their homes to the place of business;

(g) Threatening, coercing, intimidating or assaulting prospective employees, or persons seeking employment from the plaintiff, and from preventing by threats,

coercion or intimidation, such prospective employees and persons seeking employment, from entering plaintiff's place of business;

(h) Advising, encouraging or assisting or participating in the doing of any of the things herein forbidden. (R. 14, 38.)

Paragraphs (a), (b), (c) and (d), which are here in issue, prohibit officers and members of local organized groups of barbers and hairdressers and all other members of the American Federation of Labor and of the Chicago Federation of Labor (petitioners here) from (a) picketing or maintaining any picket or pickets at or near the place of business of respondent Swing, (b) from patrolling or congregating in front of or in the vicinity of respondent's place of business, in furtherance of picketing, (c) from giving publicity to their view that the beauty shop of respondent Swing is unfair to organized labor, through the exhibition of signs or placards "designed to induce and influence persons not to enter plaintiff Swing's (respondent's) place of business", or (d) from soliciting persons not to enter his place of business or to do business with him; even though the acts of giving publicity or soliciting or of picketing or patrolling may be peaceful and even though the future statements upon signs or placards may be in no sense untrue.

Paragraph (h) of the injunctions supplements paragraphs (a), (b), (c) and (d) and restrains "advising, encouraging or assisting or participating in the doing of any of the things herein forbidden." The permanent injunction is, in addition, specifically applicable to "all persons acting in concert with said trade union defendants and individual defendants." (R. 38.)

Paragraph (a) is limited to acts "at or near the place of business of plaintiff," and paragraphs (b) and (c) are limited to acts "in front of or in the vicinity of plaintiff's business." Paragraph (d) is not limited to specific per-

sons, time or place but applies to private or family conversations, as well as to all influence exerted in public or in private.

The breadth of paragraph (d) of the injunctions is such as to prohibit a local barbers' union as a member of the Chicago Federation of Labor from stating its views regarding the respondent at any meeting of that organization.

All members of the Chicago Federation of Labor and of the American Federation of Labor are subject to the terms of this injunction; and every act of solicitation or encouragement of solicitation on the part of any such member is subject to punishment as contempt of court. Neither the Chicago Federation of Labor nor the American Federation of Labor nor local unions nor individual members of such organizations may attempt in any manner to unionize present or future employees of respondent Swing, or to discourage their members or others from patronizing him. The permanent injunction extends these restraints "to all other persons, as agents, representatives, members, attorneys of the defendants and to all persons acting in concert with said trade union defendants and individual defendants."

Assignment of Error.

The Supreme Court of Illinois is in error in this case in that portions of injunctions sustained by it restrain freedom of speech and of assembly in violation of the due process of law clause of the Fourteenth Amendment.

Summary of Argument.

This case involves the validity of injunctions, temporary and permanent, which forbid all persons, whether members of labor organizations or not, to engage in or to aid in any manner, whether through speech, assembly, the

press or otherwise, in a labor dispute where the parties to the dispute are not in the proximate relation of employer and employees. The argument of petitioners against the validity of these injunctions may best be summarized by indicating the arguments that may be used in their defense.

The restraints imposed by the injunctions are sought to be justified on the grounds (1) that, under the law of Illinois, any effort by laborers, organized or unorganized, to bring pressure to bear upon employers with respect to terms and conditions of employment is unlawful where there is no proximate employer-employee relation between the parties; (2) that the whole plan being unlawful, methods which otherwise may be lawful have the force and effect of violence because of the unlawful objective, and that peaceful acts in connection therewith may therefore be enjoined, and may not under such conditions be separately permitted, although they would be so permitted if a proximate employer-employee relation were present; (3) that this Court is under a duty to apply the Illinois law in the present case, and that the objective being unlawful under the laws of Illinois, all acts of peaceful speech or assembly in aid of such objective are unlawful; (4) that the harmonizing of constitutional rights requires the protection of the employer from injury by picketing or solicitation conducted by persons having no employee relation with him; and (5) that the protection of speech and assembly under the Fourteenth Amendment applies only to restraint by the legislative department of the state government, and that therefore these guarantees may not be applied to invalidate injunctions issued by state courts.

Petitioners' argument is devoted to a refutation of these defenses.

ARGUMENT.

I.

THE CONSTITUTIONAL GUARANTEES OF FREEDOM OF SPEECH AND OF ASSEMBLY APPLY TO A LABOR DISPUTE, AND FORBID THE PRIOR CENSORSHIP OF UTTERANCES IN SUCH A DISPUTE.

At the last term of this Court, it said, in *Thornhill* v. *Alabama,* 310 U. S. 88, 102, that: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution." And in *Carlson* v. *California,* 310 U. S. 106, 112, the Court recognized that "the carrying of signs and banners" is a natural and appropriate means of conveying such information. Prior to the decisions of this Court in the *Thornhill* and *Carlson* cases, similar results were reached in Colorado with respect to an anti-picketing statute (*People* v. *Harris,* 104 Colo. 386, 91 Pac. 2d. 989), and in Nevada with respect to an anti-picketing municipal ordinance (*City of Reno* v. *Second Judicial District Court,* 95 Pac. 2d. 994). The ordinances and statutes here referred to are similar to the injunctions in the present case in that they not merely imposed a prior censorship, but specifically forbade the exercise of freedom guaranteed by the Constitution. But paragraphs (c) and (d) of the present injunctions are much broader than anything in the act and ordinance in the *Thornhill* and *Carlson* cases.

In speaking of the guarantee of freedom of speech "to every person" by the Constitution of Illinois, the Supreme Court of that state properly said:

> "If a court of equity has power to restrain and punish members of a labor union from speaking,

writing or publishing on the subject of a dispute between the union and the employer, then the members of the labor union are not such persons as are within the quoted constitutional provision." *Vulcan Detinning Co.* v. *St. Clair*, 315 Ill. 40, page 47.

It is fully established that previous censorship of the exercise of the right of speech and assembly by means of state statutes or municipal ordinances is violative of the Fourteenth Amendment. *Schneider* v. *State*, 308 U. S. 147; *Near* v. *State of Minnesota*, 283 U. S. 697. Leaving aside for the moment the question whether state judicial restraint stands upon a different basis, it may here be pointed out that the restraint sought to be imposed in the present case falls within the limits established by this Court with respect to state statutes and municipal ordinances.

One of the cases decided with *Schneider* v. *State* is closely parallel with the present case. *Snyder* v. *City of Milwaukee* involved a Milwaukee ordinance forbidding the circulation or distribution of circulars, handbills or other printed matter in streets and other public places. Here we have a similar prohibition by injunction, with the law so applied as to authorize trial courts in Illinois to issue similar injunctions in all other cases. In the Milwaukee case: "The petitioner, who was acting as a picket, stood in the street in front of a meat market and distributed to passing pedestrians handbills which pertained to a labor dispute with the meat market, set forth the position of organized labor with respect to the market, and asked citizens to refrain from patronizing it." Snyder's conviction of violation of the ordinance was reversed by this Court, on the ground that "the ordinance cannot be enforced without unconstitutionally abridging the liberty of free speech." In the present case, any person performing the same acts as *Snyder* in the Milwaukee case will be subject to equal or more serious punishment for contempt of court. If the present injunctions are sus-

tained, the courts of Illinois are authorized to accomplish a result which is violative of the Fourteenth Amendment when undertaken by a municipality in Wisconsin.

In *Hague* v. *C. I. O.*, 307 U. S. 496 (1939) "an ordinance was held void on its face because it provided for previous administrative censorship of the exercise of the right of speech and assembly in appropriate public places." An injunction accomplishing the same purpose through state judicial action should suffer the same fate.

Under the decisions of this Court, previous restraint upon freedom of speech such as that here imposed is clearly improper with respect to newspaper publication, distribution of circulars, the carrying of signs and banners, and house to house solicitation. The injunction clauses here attacked forbid these methods and all others as well. All methods by which restraint is sought to be imposed are within the constitutional prohibition; all methods of speech are within the constitutional protection.

The present injunctions forbid the future exhibition of "any sign or placard or any other matter" "designating the plaintiff's business as being non-union or unfair to organized labor, or as refusing to permit collective bargaining," and "soliciting, inducing or influencing or attempting to influence" any persons "not to enter his place of business or do business with him." (R. 14, 38. Paragraphs (c) and (d).) It is alleged in the complaint that banners previously used stating that Swing's shop was "unfair to organized labor" were false and malicious, but as indicated at page 28 of this brief, this allegation was a conclusion of the pleader, not admitted by motion to dismiss (demurrer), and had basis only in the fact that there was no employer-employee relation between the parties. This gives no basis for enjoining as untrue the continued use of banners previously employed. Moreover,

the permanent injunction entered by the Appellate Court of Illinois in this case is clearly not based on any alleged untruthful statements in the past, but upon a finding that "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i. e.*, where there is not a proximate relation of employees and employer)" (R. 37); and by dismissal of writ of error the Supreme Court of Illinois sustained this position. (R. 45-47.)

In addition, the language of the injunctions does not limit itself to a prohibition of signs and placards theretofore used, but forbids all future use of banners and all future use of any methods of solicitation, no matter how true the statements may be. This Court has said that prior censorship may not apply to future false statements, because this would establish a censorship to determine in advance whether the statements were true. Certainly, no right of the Court to determine the correctness of religious doctrine is implied in *Lovell* v. *City of Griffin*, 303 U. S. 444 or in *Cantwell* v. *Connecticut*, 310 U. S. 296.

This Court properly said in *Patterson* v. *Colorado*, 205 U. S. 454, 462:

> "The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."

This statement was repeated with approval in *Near* v. *State of Minnesota*, 283 U. S. 697 (1931), page 714.

An injunction cannot be sustained against all future utterances on the ground that some of them may be untrue; and this is particularly true in a case where the only ground of alleged untruth in past statements is the allegation that an employer cannot be unfair to others than his own employees with whom he may have a labor dispute. Moreover, the restriction here imposed applies to all statements irrespective of their truth or falsity.

II.

IN A LABOR DISPUTE, FREEDOM OF SPEECH AND OF ASSEMBLY ARE NOT LIMITED TO EMPLOYER AND EMPLOYEE. THE ABSENCE OF A PROXIMATE EMPLOYER-EMPLOYEE RELATIONSHIP DOES NOT MAKE THE WHOLE TRANSACTION UNLAWFUL AND JUSTIFY INJUNCTIONS BY STATE COURTS AGAINST ALL ACTS IN CONNECTION THEREWITH.

The opinion of the Supreme Court of Illinois sustaining the temporary injunction is based on the principle that any effort by laborers, organized or unorganized, to bring influence to bear upon employers with respect to terms and conditions of employment, when there is no proximate employer-employee relation between the parties, is unlawful, and that therefore all action in connection therewith is unlawful and has all the effects of force. In its opinion, the Supreme Court quoted and adopted the statement of issues by the Appellate Court, as follows: "The question presented for determination is whether a labor union, in which none of its members are present, past or expectant employees of an employer, has a right to picket his place of business for the purpose of compelling employees, who do not wish to join a union, to do so." (R. 26.)

The permanent injunction issued by the Appellate Court in this case was based on a statement that both that Court and the Supreme Court of Illinois had held that "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i.e.*, where there is not a proximate relation of employees and employer.)" (R. 37.)

Throughout the opinion of the Supreme Court of Illinois passing upon the temporary injunction in this case is implicit the theory that libel, force and untruth are to be construed as parts of any labor controversy in which an employer may suffer injury from action by others than his

employees. The injury itself under such conditions is regarded as the result of force and libel, even though all acts are in themselves peaceful. This view is more explicitly stated in a later opinion of that court. The opinion in the present case is largely based on *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers' Union*, 371 Ill. 377, in which there was detailed testimony as to violence. In the recent case of *Ellingsen* v. *Milk Wagon Drivers' Union* (April 10, 1940), which is being held on rehearing pending this Court's determination of the present issue, but which is reported in full in Commerce Clearing House, 2 Labor Cases, 567, the Supreme Court of Illinois applied the same principle to a case where "it was not contended that there was violence in the sense of personal contact," and said as to the *Meadowmoor* case:

> "In that case there was some evidence of violence, but an examination of the opinion will disclose that the issue of violence was not the turning point of the decision."

With respect to the issue here involved the Court said in the *Ellingsen* case:

> "In the *Meadowmoor* case the question of the right of free speech, which is earnestly urged here, was considered. Relying upon cases of the federal courts, it was held that the constitution does not protect in the use of words which may have all of the effects of force uttered for the purpose of injuring the business of another (*Gompers* v. *Buck's Stove and Range Co.*, 221 U. S. 418, 35 L. Ed. 796), and thus, even though the picketing be peaceful, if, in accordance with a concerted purpose to injure the business of another, words are used which, through fear or disturbance amount to force, such acts are subject to restriction by injunction."

Where prior acts of violence are involved, such acts constitute merely an additional, and not a necessary reason, for enjoining the whole transaction, where there is no proximate employer-employee relation. The Supreme

Court of Illinois has made it clear that peaceful acts may not be enjoined because of prior violence, where there is a proximate employer-employee relation. In *Fenske Bros.* v. *Upholsterers International Union*, 358 Ill. 239 (1934), the Court said, at page 260:

> "The mere facts that acts of violence had been previously committed would of itself furnish no justification for enjoining legal acts of peaceful persuasion. There was therefore no basis for restraining the displaying of the placards and it was error to have done it."

In view of this explicit statement, later limited to an employer-employee relationship (*Meadowmoor Dairies* v. *Drivers Union*, 371 Ill. 377, 392), it is obvious that paragraphs (a), (b), (c) and (d) of the present injunctions are sustainable under the law of Illinois only because of the absence of a proximate employer-employee relation.

Although the Illinois Anti-Injunction Act of 1925 omits the restrictive language of the Clayton Act, the Supreme Court of Illinois has held that it applies only where there is a proximate relation of employer and employee. *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers' Union of Chicago*, 371 Ill. 377 (1939). The construction of a state statute by the highest state court is binding upon this Court; and the state statutory prohibition of injunctions against the matters enjoined in paragraphs (a), (b), (c) and (d) of the present injunctions does not apply to the present case, although it would apply if there were a direct employer-employee relation. But a dispute between an employer and a union of non-employee workers in the same industry is not rendered unlawful because it loses the aid of the state anti-injunction law; and the protection of freedom of assembly and of speech comes from the Fourteenth Amendment and not from the state statute.

Under the law of Illinois, the acts covered by paragraphs (a), (b), (c) and (d) of the injunctions could not be en-

joined merely because unlawful in themselves or because of prior association with acts covered by paragraphs (e), (f), (g) and (h). Their unlawfulness and subjection to restraint arises only when there is an absence of a proximate employer-employee relation. The governmental policy of the state opposes the acts not because of their character nor because of any injury they may occasion, but because they are not committed by employees of the particular employer.

What has just been said applies clearly a different treatment where there is the same peaceful conduct in an employer-employee dispute as contrasted with one not involving employer-employee relations, even though the two involve the same objectives. And the same difference in treatment applies where the same acts of force or violence have in the past been associated with the dispute. Where there is an employer-employee relation, an injunction may issue only against acts of violence. Where no employer-employee relation exists, an injunction may under the view taken by the Supreme Court of Illinois issue against all acts either as peaceful acts alone or as peaceful acts joined with acts of violence.

Does freedom of speech and of assembly under the 14th Amendment apply equally to both, or may such freedom be limited by state action in cases where there is absence of a proximate employer-employee relation? And if such freedom is to be limited, is there to be a variant freedom under the Fourteenth Amendment, dependent upon the policy adopted by each state, or is a single uniform construction to be adopted by this Court?

It will be urged that a decision adverse to the Illinois Court will interfere with the substantive rights protected by state law, and that this should be avoided. The substantive law of the state cannot defeat a right guaranteed by the Fourteenth Amendment, although this Court must

"reconcile two rights in order to prevent either from destroying the other" (*Minersville School District* v. *Gobitis*, 310 U. S. ....., 60 S. Ct. 1010). This Court must settle the question as to whether an employer is entitled to protection from peaceful acts which may injure his business, when such acts are committed by laborers other than his employees, although he is not entitled to such protection against the same acts if committed by his employees or by prior or expectant employees. This issue involves other states than Illinois; but the effect of a decision upon the laws of the several states may be exaggerated.

In the first place, the present case is limited to a dispute between a labor organization and a non-union shop in the same community and engaged in the same industry, and has only in mind the objective stated in the *Tri-City Central Trades Council* case, (257 U. S. 184, 209), that to render their combination effective, "employees must make their combination extend beyond one shop." In this case there is a more specific controversy between labor and employer than if two competing unions were striving for supremacy in a union shop, with the employer in the position of an injured bystander.

Moreover, states which have adopted the definition of "labor dispute" found in the Norris-LaGuardia Act will not be affected. This is the result under *American Furniture Co.* v. *I. B. of T. C. & H. of A.*, 222 Wisc. 338, 268 N. W. 250 (1936); *Denver Local Union* v. *Perry Truck Lines*, 101 Pac. (2d) 436 (Colo., 1940); *Mays Furs and Ready-To-Wear* v. *Bauer*, 282 N. Y. 331; 26 N. E. 2d. 279 (1940). Where there is no such statutory definition, state courts have often held that an employer-employee relationship is not a requisite of a labor dispute, where there is a substantial common concern. Decisions of this character are reviewed in *City of Reno* v. *Second Judicial District Court*, 95 Pac. 2d. 994 (Nev. 1939).

In some other states, the statutes or existing rules of common law or equity will be affected. Wisconsin by statutory amendment of 1939 (Laws, 1939, Ch. 25) defined a labor dispute to mean "any controversy between an employer and a majority of his employees." Recent statutory changes have accomplished similar results in Oregon (Laws, 1939, Ch. 2), and Pennsylvania (Laws, 1939, p. 302); Minnesota accomplishes the same purpose in part by requiring that a majority of picketers be employees of the place of employment being picketed (Minn. Laws, 1939, Ch. 440). A careful analysis of state statutes has been made by Russell A. Smith and William J. DeLancey, *The State Legislatures and Unionism,* 38 Mich. Law Review, 987-1031 (May, 1940). In some other states, as in Illinois, statutes have been so construed as to leave the determination of the issue to the courts. This has been accomplished in Massachusetts, where the Court has held that a broad statutory definition of "labor dispute" does not apply to acts of picketing or persuasion, and that "by our common law the right to strike and to maintain pickets against an employer is deemed the right of his employees only." *Simon* v. *Schwachman,* 18 N. E. 2d. 1 (1938); *Quinton's Market* v. *Patterson,* 21 N. E. 2d. 546 (1939).

A decision by this Court that a proximate employer-employee relationship is not necessary to preserve freedom of speech and of assembly in a labor dispute, will, and should affect the substantive standards of states whose courts hold, either at common law or on the basis of statutes, that such a dispute is unlawful and that therefore all actions in connection therewith are unlawful. This is the basis of the opinion of the Supreme Court of Illinois, now under review and finds support in *Retail Clerks Union* v. *Lerner Shops,* 193 So. 529 (Fla., 1939); *Roth* v. *Local Union No. 1460 of Retail Clerks Union,* 24 N. E. 2d. 280 (Ind., 1939); and *Crosby* v. *Rath,* 136 Ohio St. 352, 25 N.

E. 2d. 934 (1940). From the Ohio decision a petition for certiorari is now pending in this Court.

The provisions of the injunctions here at issue can be sustained only on the ground that all peaceful acts in a labor dispute are unlawful if there is no proximate employer-employee relation. This Court has already expressed its opinion as to this matter.

In dealing with non-employees not under the Clayton Act, this Court said in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 212-213 (1921), that the members of a local union and the union itself "have sufficient interest in the wages paid to the employees of any employer in the community to justify their use of lawful and peaceable persuasion to induce those employees to refuse to accept such reduced wages and to quit their employment." Although the American Federation of Labor and the Chicago Federation of Labor and the members thereof are parties in the present case, they are so because of the membership therein of local unions, and the pleadings show that the injunctions are primarily directed against members of the local unions of barbers and hairdressers because of their actions or anticipated actions with respect to a non-union beauty shop and non-union workers in the same industry and within the same territorial area. The employees in the present case have a closer substantial interest than did the thirty-seven trade unions united in the Tri-City Central Trades Council.

In the *Tri-City Central Trades Council* case, the Court said, at page 209:

> "To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership, and especially among those whose labor at lower wages will

> injure their whole guild. It is impossible to hold such persuasion and propaganda, without more, to be without excuse and malicious."

The Supreme Court of Illinois has held that such persuasion and propaganda, without more, are without excuse and malicious.

In *Thornhill* v. *Alabama*, 310 U. S. 88, 103, this Court recently quoted with approval the statement of Mr. Justice Brandeis in *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 478:

> "Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

As a basis for this indication of the scope of freedom of speech, Mr. Justice Brandeis stated in the same case that: "Neither Senn or any of his employees was at the time this suit was begun a member of either union, and neither had any contractual relations with them" (page 473); and that "the fact that none of Senn's employees was a union member, or sought the union's aid, is immaterial" (page 481).

The facts of the *Thornhill* case do not show the nature of the dispute, but in that case, this Court not only approved the statement of Mr. Justice Brandeis, in the *Senn* case, but said, at 310 U. S. 102-103:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. • • • It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing."

And in *Carlson* v. *California*, 310 U. S. 106, the Court recognizes not only the rights of union non-employees but also the rights of "disinterested persons (who might be hired to carry signs)."

This Court has clearly recognized that persons other than employees may have an interest in a labor dispute, and may exercise freedom of speech and of assembly in the expression of such interest. Restraint of such freedom is not within the power of a state. If there may be a lawful labor dispute without a proximate employer-employee relation, each side is entitled to tell its story peacefully and without violence.

III.

THE SCHEME OF ACTION BY ORGANIZED LABOR IN THE PRESENT CASE IS NOT UNLAWFUL, AND THOUGH UNLAWFUL ACTS IN SEEKING ITS ACCOMPLISHMENT MAY BE ENJOINED, SEPARABLE LAWFUL ACTS MAY NOT BE RESTRAINED.

The Supreme Court of Illinois takes the view that there is here an unlawful scheme because (1) no proximate relation of employer and employees exists, and that therefore all acts in connection therewith have the effect of force; (2) the activities of the union will be injurious to the employer; and (3) that if acts approaching violence are admitted, even on the basis of demurrer, all acts become unlawful and may be enjoined by a court of equity.

(1) Enough has been said as to the first of these points. Peaceful acts of speech and assembly may not be enjoined because of absence of an employer-employee relation. Force, violence, malice and untruth are not presumed from the absence of such relationship in a labor dispute.

(2) The contention that peaceful activities of the union will be injurious to the employer is also based on the absence of an employer-employee relation. In *Fenske Bros.* v. *Upholsterers International Union*, 358 Ill. 239,

quoted at page 16 of this brief, the Supreme Court of Illinois has made it clear that if there is a proximate employer-employee relation, the employer must endure the injury occasioned by peaceful acts such as are enjoined by paragraphs (a), (b), (c) and (d) of these injunctions; and the alleged unlawful injury in the present case is based upon the statement by the Supreme Court of Illinois that "terms [were] prescribed by others without lawful power to prescribe them." (R. 28.)

It is fully established that the free exercise of speech and of assembly in a labor dispute is not defeated merely by the fact that their exercise may be injurious to the employer. When the *Tri-City Central Trades Council* case, quoted above, was in the United States Circuit Court of Appeals, that Court stated briefly and clearly the rule here applicable. It said:

> "Methods may be considered lawful, even though the employer's business is interfered with, because such methods are incidental to the right of the employee, which right should be and is recognized as equal to the right of the employer." (238 Fed. 729, page 733).

A similar view is reflected in the opinion by this Court in the *Tri-City* case, quoted above.

In *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468 (1937), this Court said:

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. * * * It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. * * * It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he had hoped to get. But a hoped-for job is not property guaranteed by the Constitution." (Pages 478, 482.)

More recently this position has been reaffirmed in *Thornhill* v. *Alabama*, 310 U. S. 88, at page 104:

> "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that other may thereby be persuaded to take action inconsistent with its interests."

The mere fact of injury to the employer because of the lawful exercise of freedom of speech and of assembly in a labor dispute does not justify a restraint upon such freedom; and this statement applies equally where there is an employer-employee relation and where there is a substantial interest upon the part of non-employees.

(3) The contention that admitted acts of violence make all acts unlawful again presents the issue as to the employer-employee relation, because the Supreme Court of Illinois has made it clear that, had such a relation existed, paragraphs (a), (b), (c) and (d) of the present injunctions would be invalid under the law of that state, even though there had been prior acts of violence. (*Fenske Bros.* v. *Upholsterers International Union*, 358 Ill. 239, quoted at page 16 of this brief.)

No Admissions of Violence or Untruth Support the Permanent Injunction.

Nor does the question of admitted acts of violence present itself as to the permanent injunction. As hereafter indicated, the motion to dismiss (demurrer) admitted facts well pleaded in the complaint. The order of the trial court striking the complaint was "reversed, an-

nulled and set aside" by the Appellate Court (R. 23-24), and this action was affirmed by the Supreme Court of Illinois. (R. 33.) The reversal of the trial court's favorable action on the motion to dismiss disposed of that motion, together with any admissions made thereby, and left further proceedings to be determined on the basis of the complaint and answers. The permanent injunction is explicitly based upon a finding that appellants (Swing, *et al.*) maintained their complaint on the ground that, under the law of Illinois, "peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i.e.*, where there is not a proximate relation of employees and employer)." (R. 37.)

The orders of the trial court dissolving the temporary injunction and dismissing the complaint were set aside by the reviewing courts, and the temporary injunction was reinstated on the ground that the motion to dismiss was improperly granted. This constitutes a denial of the motion to dismiss. The motion to dismiss (demurrer) and all admissions thereby disappeared from the picture when such motion was held by the Appellate and Supreme Courts of Illinois to have been improperly granted by the trial court; and the subsequent decree of the Appellate Court granting a permanent injunction was not entered in review of the trial court, but was an exercise of power to enter an original judgment on the showing by complaint and answers that there was no employer-employee relation between the parties. In the exercise of such power, the state Appellate Court was acting under express statutory authority to "give any judgment and make any order which ought to have been given or made." (Civil Practice Act of Illinois, Sec. 92 (1) (f). Ill. Revised Statutes, 1939, Ch. 110, Sec. 215.) Had the case been remanded to the trial Court, that court would have been under a duty to treat the motion to dismiss as denied and to try the case on the merits or to enter a decree if the facts shown

by the complaint and answers justified such action without trial. The court of review has and in this case exercised power to do what the trial court would have been under a duty to do. The power of the State Appellate Court to enter an original judgment upon the complaint and answers is not under dispute in this Court, but is finally decided by the action of the Appellate Court of Illinois, and by the denial of writ of error by the state Supreme Court. *Central Union Telephone Co.* v. *City of Edwardsville,* 269 U. S. 190.

A motion to dismiss, like a demurrer, primarily tests the sufficiency of pleadings. If such a motion is sustained against a complaint or an answer, the party has an opportunity to plead over. If a motion is denied, the party against whom the denial is made may file an answer upon the merits, or, as in this case, may rely upon an answer on the merits which has been filed before he made the motion to dismiss.

Legally, the allegations of the complaint play no part in the granting of the permanent injunction, except as they and the answers show that the defendants were not employees of the plaintiff but that the defendant members of local unions were engaged in the same industry and within the same territorial area. Without proof, the absence of an employer-employee relation appeared on the face of the pleadings, and this was regarded as sufficient basis for the permanent injunction.

The decree of the Appellate Court, which made the injunction permanent, and the refusal of the state Supreme Court to review such decree, are based upon the fact that the pleadings showed the absence of a proximate employer-employee relation, and that such absence without more entitled plaintiffs to a permanent injunction under the law as declared by the Appellate and Supreme Courts. This was the finding stated in the Appellate Court's decree. The plaintiffs being entitled to a decree upon such

showing, it was therefore unnecessary to remand the case to the trial court for the trying of issues of alleged violence raised by the complaint and denied by answer.

Admissions of Violence by Pleadings Under Which the Temporary Injunction Was Sustained Were Insufficient to Sustain the Contested Provisions of That Injunction.

The temporary injunction was based on a motion to dismiss the complaint and inasmuch as said motion admitted the well-pleaded allegations of the complaint, it is proper to discuss such allegations in their relation to the temporary injunction.

However, attention should again be called to the fact that, under the *Fenske Bros.* case, quoted at page 16 of this brief, paragraphs (a), (b), (c) and (d) of the temporary injunction could not be sustained by the Supreme Court of Illinois where there is an employer-employee relation, even though prior violence had been established. The net result under the law of Illinois is that no peaceful acts may be enjoined, whether alone or joined with acts of force or violence, where there is an employer-employee relation; and that all acts may be enjoined, whether altogether peaceful or joined with acts of violence, where there is no employer-employee relation. Independently of the existence or non-existence of violence in the present case, the validity of these paragraphs of the temporary injunction may be determined, independently of the motion to dismiss, on the issue as to whether freedom of speech and of assembly may be forbidden in a labor dispute where there is no proximate employer-employee relation, although it may not be forbidden if there is such a relationship. It is desirable, however, even in view of this fact, to present the issues of violence to the Court.

Under Illinois practice: "A motion to dismiss, like a demurrer, admits such facts as are directly alleged. A

demurrer or motion to dismiss does not admit conclusions drawn by the pleader." *Barzowski* v. *Highland Park State Bank,* 371 Ill. 412 (1939), p. 416. Although sworn answers were filed denying the allegations of the complaint and are a part of the record in this case (R. 16, 18), the subsequent motion to dismiss presented by the defendants relied upon the motion independently of such answers.

The opinion of the Supreme Court of Illinois concedes that one allegation of the complaint (that as to malice in statements on signs) was a conclusion of the pleader. (R. 25), but proceeds on the assumption that all allegations are properly pleaded and are admitted. This Court is not bound by the statement of fact by the state court. Where issues of federal right are involved and detailed facts are admitted by demurrer "this Court must analyse the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the state supreme court in this regard." (*Truax* v. *Corrigan,* 257 U. S. 312, 325.) The facts of the present case also bring it within the statement of this Court that: "This Court will review the findings of fact by a state court (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyse the facts." (*United Gas Public Service Co.* v. *Texas,* 303 U. S. 123, 143.)

The allegation of the complaint perhaps most relied upon in the opinion of the Supreme Court of Illinois is that two pickets carried signs that "This Beauty Shop is Unfair to Organized Labor" and that this statement was "untrue and designedly false and malicious." (R. 10.) The opinion of the Court said that the charge of malice was a conclusion of the pleader, but that it was sufficiently established by

the fact that the employees joined the employer in the suit. (R. 25.) In their brief opposing the petition for writ of certiorari in this case (page 17), respondents charged that the statements were libellous, but would cease to be so if a later employer-employee relation were established, thus indicating that the alleged libel was based upon an opinion as to the relations of the parties to the labor dispute. The allegations of falsity and maliciousness would appear to be conclusions of the pleader, and the admission by motion to dismiss relates only to the carrying and to the content of the signs. If freedom of speech applies to a labor dispute where there is no proximate employer-employee relation, there is nothing false or malicious. In *Carlson* v. *California*, 310 U. S. 106, 112, this Court properly said that: "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern."

In one matter the complaint expressly states a "conclusion" that the hot water apparatus was in good condition (R. 11), and that subsequent defects were occasioned by a conspiracy of defendants. Little weight can be given to conclusions of this character.

If the determination of the issues of this case depended upon proof of violence, there are certain acts admitted by motion to dismiss (demurrer) which may be so termed. It is so admitted that one woman grabbed another by the arm (R. 6); that two men told a woman not to patronize the shop (R. 6); and that pickets gazed and stared at defendant's employees. (R. 11.)

But the acts of violence admitted by the pleadings are not sufficient to support injunctions of the character here at issue, and, as previously indicated, are not admitted as to the permanent injunction. The injunctions have been analysed on pages 7-8 of this brief. They forbid all future peaceful acts and all future statements, irrespective of their truth or falsity. The restraints are not limited to local

unions and their members, but apply to all actions and to all persons, irrespective of time, place or manner. The violence shown by pleadings in the record of the present case is not sufficient to support an injunction against peaceful speech and assembly.

Violence of a much more serious character, established by evidence, existed in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 212-213, but in that case this Court not only separated lawful from unlawful acts, but it held it improper to enjoin future "lawful and peaceable persuasion," and sustained the rights of organized labor to engage in peaceful persuasion and propaganda, without requiring the existence of a proximate employer-employee relation. Similar action is more easily possible with respect to the temporary injunction in the present case than it was in the *Tri-City Central Trades Council* case, and the law of the state of Illinois makes such action necessary where there is a proximate employer-employee relation. *Fenske Bros.* v. *Upholsterers International Union*, 358 Ill. 239, quoted at page 16 of this brief. If such separation is possible in the one case, it is possible in the other, and if it is not required, it enjoins freedom of speech and of assembly in a labor dispute where such relation does not exist.

The position of the Supreme Court of Illinois finds some basis in the statement of Dean Roscoe Pound that:

> "A growing number of decisions allow an injunction where the writing or publication is a part of a wrong which would be enjoined of itself." Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. Law Rev. 640 (1916), page 655.

Dean Pound added: "But this would be wrong on Blackstone's theory and also under the view taken in *Brandreth* v. *Lance*." (8 Paige, 24, N. Y. 1839.) In *Near* v. *State of Minnesota*, 283 U. S. 697, pages 713-714, this Court has approved Blackstone's theory as to previous restraints.

In the effort to sustain the portions of the injunctions

which restrain peaceful action, on the ground that such peaceful acts are joined with acts of violence, and therefore become parts of an unlawful scheme, support may be sought from *Busch Jewelry Co.* v. *United Retail Employees' Union*, 281 N. Y. 150; but in the more recent case of *May's Furs and Ready-To-Wear* v. *Bauer*, 282 N. Y. 331; 26 N. E. 2d. 279, the Court struck from an injunction "all provisions except those restraining violence, breach of the peace and false and misleading statements," saying that the *Busch* case was based on a finding that there was "a situation completely permeated with violence and as affording no ray of hope that the defendant would engage in other than violent picketing." And in *Nann* v. *Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931) all picketing was enjoined because acts of violence had persisted in violation of a prior injunction. In the *Nann* case the court quoted with approval the statement in *Exchange Bakery and Restaurant* v. *Rifkin*, 245 N. Y. 260, 269, that:

> "Where unlawful picketing has been continued, where violence and intimidation have been used, and where misstatements as to the employer's business have been distributed, a broad injunction prohibiting all picketing may be granted."

In the present case we have no such situation, and the injunctions not only forbid picketing but all peaceful actions remote from respondent Swing's place of business. And here acts of violence can be separated from those that are peaceful and lawful. The present injunctions can be sustained only on the ground that any peaceful actions whether at the place of dispute or elsewhere, or whether by members of the local union or others, are so united with unlawful acts of violence as to be inseparable now or at any future time.

The rule in the *Busch* case applies to the character of actions and not to the character or relationship of the parties. It applies to a labor dispute irrespective of the presence or absence of a proximate employer-employee re-

lation. Each is governed by the exception in the *Busch* case, and each is entitled to the same protection as in the *Fenske* case under Illinois law.

In order to sustain the restraint here sought to be imposed upon rights guaranteed by the Fourteenth Amendment, it would be necessary to bring the present case within the language of Mr. Justice Holmes who said that "the most stringent protection of free speech would not protect a man * * * from an injunction against uttering words which have all the effect of force." *Schenck* v. *United States,* 249 U. S. 47 (1919), page 52, quoted with approval in *Near* v. *State of Minnesota,* 283 U. S. 697 (1931), page 716. Similar language is found in *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418 (1911), page 439. The statements by this Court in the *Gompers* and *Schenck* cases were applied to unlawful conspiracies, and the language referred to was an essential part of the conspiracy.

Here we have no unlawful conspiracy or other unlawful purpose, but rather a valid objective within the language of this Court in the *Tri-City Central Trades Council* case: and we have also admittedly valid portions of the present injunctions restraining the use of force as a means of achieving the lawful objective. The petitioners here seek relief only from a general restraint upon all future peaceful utterances. The right of assembly is necessarily incident to the right of speech which is so involved.

The Supreme Court of Illinois takes the view that all acts are unlawful and enjoinable in a labor dispute where there is not an employer-employee relationship. As has heretofore been indicated, the issue of admitted violence is not presented as to the permanent injunction, and the issue as to the temporary injunction may be decided independently of the allegations of violence in the pleadings. But the same result is reached if consideration is to be given to such allegations.

IV.

THE BALANCING OF CONSTITUTIONAL RIGHTS SUSTAINS FREEDOM OF SPEECH AND OF ASSEMBLY IN THE PRESENT CASE.

"It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others. * * *." Mr. Justice Holmes in *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 357. This Court has recently had occasion to apply this principle in *Minersville School District* v. *Gobitis,* 310 U. S. ...., 60 S. Ct. 1010.

Senn v. *Tile Layers Protective Union,* 301 U. S. 468, 482, and *Thornhill* v. *Alabama,* 310 U. S. 88, are quoted at pages 23-24 of this brief to the effect that the mere fact of injury to the employer because of the lawful exercise of freedom of speech and of assembly in a labor dispute does not justify a restraint upon such freedom. The case of *Fenske Bros.* v. *Upholsterers International Union,* 358 Ill. 239, quoted at page 16 of this brief, shows that the same principle is applied in the state of Illinois where there is a proximate relation of employer and employees. The quotation from the *Senn* case at page 21 of this brief clearly indicates that this Court applies the same principle irrespective of whether there is a proximate relation of employer and employees.

In reconciling the respective rights involved in the present case, it is clear that freedom of speech and of assembly does not justify force or violence, and it is equally clear that the absence of a proximate employer-employee relation does not justify a prohibition against the exercise of these constitutional rights. The balancing of rights does not justify the complete destruction of one in the interest of the other.

Petitioners contend that in the present case the objective is lawful, and that the means of its accomplishment through peaceful solicitation are lawful and are improperly enjoined by the first four paragraphs of the injunctions in this case. There is not a conflict between property and individual rights. Here as in other cases the individual rights must be exercised within proper limits, and there is a remedy for the abuse of freedom of speech. But where the purpose is lawful and the means of its accomplishment are lawful, this Court has properly taken the position in the *Senn, Schneider* and *Thornhill* cases that an injury incident to the exercise of individual property rights may not defeat these rights.

That constitutionally protected freedom of speech may result in abuses in other fields than that of labor disputes is recognized by our law of libel and slander and by other laws for the protection of the individual. The possibility of such abuse was recently recognized by this Court in *Schneider* v. *State,* 308 U. S. 147, 164, when it said:

> "Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."

The harmonizing of co-equal constitutional rights, referred to by the Supreme Court of Illinois, is accomplished by a restraint upon force or violence. But where the pur-

pose is lawful, even though its accomplishment may be injurious, it may not be restrained by a previous censorship of freedom of speech, although there may be and is a remedy for the abuse of such freedom.

It is admitted that the balancing of rights protects labor where there is a proximate employee-employer relation; and this Court has properly said in the *Tri-City* and *Senn* cases that the same protection applies to "employees" who "must make their combination extend beyond one shop" in the same trade and the same community.

V.

THE FOURTEENTH AMENDMENT PROTECTS FREEDOM OF SPEECH AND ASSEMBLY FROM STATE JUDICIAL IMPAIRMENT AS FULLY AND COMPLETELY AS FROM IMPAIRMENT BY OTHER DEPARTMENTS OF THE STATE GOVERNMENT.

The Supreme Court of Illinois has construed the anti-injunction act of that state to apply only to labor disputes in which there is a proximate relation of employer and employees. The prohibitions of that act therefore forbid provisions like paragraphs (a), (b), (c) and (d) of the injunctions only where there is such a relation; and it is for the Supreme Court of that state to determine in first instance what rules of law shall apply where no such relation exists. These provisions of the injunctions are therefore purely judicial actions. It may therefore be urged that even though such provisions would be invalid in a state statute or in municipal ordinances, the judicial action is not subject to the Fourteenth Amendment.

The municipality is an agent of the state and its action is state action. The court is an instrumentality of the state, and its action is state action. The Fourteenth Amendment forbids any state to deprive of life, liberty or property without due process of law. The Court must look to the result and not to the instrumentality of the

state which accomplishes the result. "Whoever, by virtue of a public position under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name of and for the state, and is clothed with the state's power, his act is that of the state. This must be so or the Constitutional provision has no meaning." *Ex parte Virginia,* 100 U. S. 339 (1880).

The due process clause of the Fourteenth Amendment has been systematically construed to apply to all state action, whether legislative, executive or judicial. This Court has carefully protected individual rights against impairment by state judicial action. *Tumey* v. *State of Ohio,* 273 U. S. 510; *Brown* v. *State of Mississippi,* 297 U. S. 278; *Chambers* v. *State of Florida,* 309 U. S. 227.

It may, however, be argued that, in protection of freedom of speech and assembly, the Fourteenth Amendment goes no farther than the First Amendment, and that the First Amendment protects only against restraint by Congress and not by other departments of government. It is true that the First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech or of the press; or the right of the people peaceably to assemble." But by the Fifth and Fourteenth Amendments these rights are guaranteed against impairment by any department of either national or state government. The due process clause of the Fourteenth Amendment applies to any state action; and it seems clear that this Court would have reached the same result in *Near* v. *State of Minnesota,* 283 U. S. 697, had there been no state statute and had the state court sought to impose the same "previous restraint" upon the basis of a claimed equity jurisdiction.

But it may be urged that the determination of labor

controversies and of the legality of actions in connection therewith is properly a matter of state regulation and that this Court should therefore follow restrictive decisions of state courts, even though such decisions may curtail freedom of speech and of assembly as recognized by this Court under the Fourteenth Amendment. If this Court were bound by the determinations of state courts as to what constitutes due process of law under the Fourteenth Amendment, review of such determinations by this Court would be useless.

Briefly summarized, the argument here is that a state court may, by calling an act unlawful, be permitted to withdraw it from the protection of the Fourteenth Amendment.

It may be urged that this position is supported by *Minersville School District* v. *Gobitis*, 310 U. S. ....., 60 S. Ct. 1010, where state policy was held controlling as to "the wisdom of training children in patriotic impulses" in the public schools of the states; but a similar policy is not here involved, and that the principle of the *Gobitis* case is not applicable here is made clear by the language of the *Thornhill* case, decided by this Court less than two months prior to the *Gobitis* case.

Support may also be sought from the statement by Mr. Justice Holmes in *Patterson* v. *Colorado*, 205 U. S. 454, 461: "What constitutes contempt, as well as the time during which it may be committed, is a matter of local law." The *Patterson* case involved punishment for contempt in the publication of criticisms of a state court with respect to actions still pending. This Court stated that the facts were sufficient to show that contempt existed and said that "We leave undecided the question as to whether there is to be found in the 14th Amendment a prohibition similar to that in the 1st." The facts of the case clearly distinguish it from that now before the Court. It was de-

cided in 1907, and although frequently cited since that date, such citations do not support the doubt as to the scope of the Fourteenth Amendment nor a position that local law is to determine the extent to which freedom of speech and of assembly may be curbed by state judicial action.

At the expense of some duplication, it may be well to indicate briefly the effect in the present case if state law is controlling as to freedom of speech and of assembly under the Fourteenth Amendment: (1) The Supreme Court of Illinois takes the view that any effort of non-employee union members to disseminate information that an employer is non-union is unlawful, and that any peaceful solicitation is therefore part of an unlawful scheme and an unlawful interference with property rights. This Court takes a different view in the *Tri-City* and *Senn* cases. (2) The Illinois Supreme Court takes the view that non-employee solicitation which may interfere with or injure the employer's business is unlawful, and is in no way protected by the Fourteenth Amendment. A different view has been taken in the *Tri-City, Senn* and *Thornhill* cases. (3) The Illinois court takes the position that the existence of any elements of violence in the past authorizes the complete prohibition of any peaceful acts of solicitation in the future. This Court has taken a different view in the *Tri-City* case, holding it improper under such circumstances to enjoin future "lawful and peaceful persuasion." (257 U. S. 184, pp. 212-213.) All of these issues are fundamental to freedom of speech and of assembly under the Fourteenth Amendment.

Under the view taken by the Supreme Court of Illinois, the injunction provisions here in issue are sustained; under the view taken by this Court, they would be violative of the Fourteenth Amendment. Which is to govern? Is each

state to determine the limits of freedom of speech and of assembly?

If this Court should regard it as its duty to follow the state courts, each state court may set its own standards as to what conduct is unlawful and beyond the protection of the federal constitutional guarantee of freedom of speech and of assembly, and this Court would be bound by such standards. This would mean that in the present case this Court would abandon its views, and accept the Illinois Court's views, as to the unlawfulness of (1) peaceful solicitation by non-employees in a labor controversy; (2) injury to the employer's business incident to such peaceful solicitation; and (3) future peaceful persuasion where there has in the past been an element of force or violence. These are unlawful under the state judicial standard in Illinois, and are lawful under the standards set by this Court. The state court finally determines what is the law of the state, but it cannot decide finally whether the law so determined infringes rights guaranteed by the Constitution of the United States, nor can it establish controlling standards for the determination of the scope of such rights. Without a power of final determination of these rights by this Court, and without the exercise of that power as a matter of duty, "the Constitution of the United States would be different in different states, and, might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states." *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 348.

With respect to degree of restraint, paragraphs (a) and (b) of the present injunctions present substantially the same issues as those involved in the *Thornhill* and *Carlson* cases; but paragraphs (c) and (d) of the injunctions (R. 14, 38) impose restrictions upon speech and assembly much broader than in those cases. The terms of the injunctions are more restrictive than those of the statute and ordinances that have been held invalid.

With respect to the question whether the Fourteenth Amendment applies to judicial action, attention should be called to the fact that judicial restraint is much more effective than legislative restraint. It is true that a separate injunction is required in each case; but the Supreme Court of Illinois has in the present case prescribed the pattern of such an injunction, and has made it the duty of trial courts to issue such an injunction upon a showing of absence of an employer-employee relationship. That this is the position of the Supreme Court of Illinois is made certain by the explanatory statement of that court in the recent *Ellingsen* case, quoted at page 15 of this brief.

The restraint by injunction is under this view a matter of right, and the inferior courts have no discretion. The Appellate Courts of Illinois have necessarily applied the law as established by the state Supreme Court. *Hendrickson Motor Truck Co.* v. *International Association of Machinists,* 301 Ill. App. 608; *Jaffe* v. *Auto Mechanics Local,* 301 Ill. App. 624. And if state law governs, the principles of this case and of the *Meadowmoor* case, as explained in the *Ellingsen* case, will be controlling in the federal courts if the present decision stands. *Lake Valley Farm Products* v. *Milk Wagon Drivers' Union,* 108 Fed. (2d) 436, 443, which is now under advisement in this Court on review.

Since the original opinion of the Supreme Court of Illinois in the present case (June 19, 1939), injunctions substantially identical with that here involved have been obtained in practically every labor controversy in Illinois where the proximate relation of employer and employee was absent; and a conservative estimate of the number of such injunctions would indicate at least one hundred in the state as a whole, and at least fifty of this number in Cook County.

With reference to restraint by injunction, it should also be indicated that violations are punishable by summary proceedings for contempt, and that more effective enforcement is thus possible, without the necessity of according the accused the ordinary safeguards of the judicial process.

Conclusion.

Again calling attention to the fact that petitioners limit their attack to provisions of injunctions which restrain peaceful persuasion, it should be stated that there is no desire to protect violence, but rather to discourage violence or force. The suppression of free speech does not suppress, but encourages, violence.

Respectfully submitted,

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